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In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

UNITED STATES OF AMERICA, PETITIONER

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the Supreme Court of New Jersey in this case.

OPINION BELOW

The opinion (R. 4a-8a[1]) of the Superior Court, Chancery Division, Bergen County, is not reported. The opinion of the Supreme Court of New Jersey (Appendix, *infra*, pp. 10-17) is not yet reported.

[1] "R." references are to the Appendix to Plaintiff-Appellant's brief below.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on July 6, 1965 (Appendix, *infra*, pp. 17-18). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

A State law provides that, in mortgage foreclosure actions, an allowance for an attorney's fee, fixed as a percentage of the amounts adjudged by the foreclosure court to be due under the mortgage, shall be a part of the taxed costs of the action. The question presented is whether a federal tax lien is entitled to priority over the mortgagee's claim for such attorney's fee, where notice of the federal tax lien was recorded prior to default by the mortgagor.

RULE INVOLVED

Rules Governing the New Jersey Courts (1965 ed.):

4:55-7. *Counsel Fees*

No fee for legal services shall be allowed in the taxed costs or otherwise, except:

* * * *

(c) In an action for the foreclosure of a mortgage. The allowance shall be calculated as follows: on all sums adjudged to be paid the plaintiff in such an action, amounting to $5,000 or less, at the rate of 3%, provided, however, that in any action a mimimum fee of $75 shall be allowed; upon the excess over $5,000 and up to $10,000 at the rate of 1½%; and upon the excess over $10,000 at the rate of 1%.

* * * *

STATEMENT

This case began as a mortgage foreclosure action brought by respondent, the first mortgagee. The United States, a tax lien claimant, was named a party as provided in 28 U.S.C. 2410. The mortgage, covering real property owned by Albert Bagin and his wife, had been executed on December 13, 1960, and recorded a few days later. It secured the Bagins' indebtedness of $30,000 to the respondent. On March 21, 1962, a federal tax lien for $7,748.91 was filed against Mr. Bagin. A year later he and his wife defaulted on the mortgage and foreclosure proceedings were commenced.

In its answer filed in the foreclosure suit, the United States admitted that its lien was subordinate to the principal and interest on the mortgages[2] but claimed that its tax lien was superior to any claim for attorney's fees (R. 3a-4a). The Chancery Court agreed and, in its decree of foreclosure, granted the federal tax lien priority over respondent's attorney's fee, which the court fixed under the statute at $425.52. Respondent appealed to the Superior Court of New Jersey, Appellate Division. While the case was pending there, the appeal was certified to the New Jersey Supreme Court on its own motion. That court directed that the property be sold forthwith. After the sale, it ruled that the mortgagee's attorney's fee was payable ahead of the federal tax lien out of the proceeds of the sale.

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[2] A second mortgage had been recorded on December 19, 1960, and a third on May 18, 1961.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with and misapplies the principles of this Court's decision in *United States* v. *Pioneer American Ins. Co.*, 374 U.S. 84, which established the standards governing the determination of priority as between the federal tax lien and the mortgagee's claim for an attorney's fee for prosecuting the action to foreclose the mortgage. In *Pioneer*, the mortgage agreement provided for payment to the mortgagee of a "reasonable attorney's fee" in the event of foreclosure (P. 90). After default and the institution of the foreclosure action, but before entry of the judicial decree determining the attorney's fee, the United States recorded its tax lien on the property. Applying the settled principle that the priority of the federal tax lien could be defeated only by a prior recorded choate lien, this Court held that the federal tax lien enjoyed priority. At the time that lien was recorded, the mortgagee's claim for a reasonable attorney's fee had been "undetermined and indefinite" (p. 90). It had not been "reduced to a liquidated amount" (p. 91). There was not even a "showing in this record that the mortgagee had become obligated to pay and had paid any sum of money for services performed prior to the filing of the federal tax lien" (*ibid.*). Thus, the mortgagee's claim had been not only "uncertain in amount" but "yet to be incurred and paid" (*ibid.*).

Despite some factual differences, the rationale of *Pioneer* requires that in the present case, too, the federal tax lien be accorded priority over the mort-

gagee's claim for an attorney's fee. Here, to be sure, the *method* of computing the fee due the mortgagee was not indefinite; under the statute, the fee is fixed at a specified percentage of "all sums adjudged to be paid" the mortgagee in the foreclosure action. But the *amount* of the fee was uncertain. It depended on the amount adjudged by the foreclosure court to be due the mortgagee, which would not be determined until the foreclosure action was completed.[3]

Moreover, in the present case the federal tax lien was recorded prior to default—at a time, that is, when the mortgagee's claim to an attorney's fee in the event of foreclosure was wholly contingent and uncertain. In *Pioneer*, in contrast, where the federal tax lien was not recorded until after the foreclosure action had been instituted, it was certain that the mortgagee would be entitled to an attorney's fee; only the amount remained to be determined. Thus, when the federal tax lien was recorded here, not only was the mortgagee's attorney's fee "undetermined and indefinite" and yet to be "reduced to a liquidated

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[3] The court below (Appendix, p. 17, *infra*) relied on *Security Mortgage Co.* v. *Powers*, 278 U.S. 149, for the proposition that the fixed percentage feature of the attorney's fee in this case made the *Pioneer* rule inapplicable—thereby disregarding the Court's observation in *Pioneer* (p. 90, n. 8) that the issue in *Security* was the status of an attorney's fee clause in bankruptcy proceedings "where the rigorous federal lien choateness test was not necessarily applicable." Nor does the fixed percentage feature make the attorney's fee here similar to interest on the principal amount of the mortgage, which concededly is entitled to priority over the federal tax lien. Interest is of the essence of the mortgage obligation. It is due so long as the mortgage remains in force, and it is not contingent on default or foreclosure.

amount", but, since the mortgage was not then in default, the mortgagee had not performed any of the services for which the fee was intended to compensate him; nor was it known whether he would ever be entitled to such fee.

2. The court below, in attempting to distinguish *Pioneer*, emphasized that in this case the mortgagee's right to an attorney's fee derived not from the mortgage agreement but from a State statute treating such fee as part of the taxable costs of the foreclosure action.[4] This Court held in *United States* v. *Buffalo Savings Bank*, 371 U.S. 228, 229, that a State cannot, "by the formalistic device of characterizing subsequently occurring local liens as expenses of [the foreclosure] sale", confer priority over the federal tax lien on a lien for State real estate taxes. Here, the State has sought to confer priority on the claim for an attorney's fee by no less a "formalistic device" of treating the claim as a taxable cost of the foreclosure action. For, just as local taxes are different from expenses of sale, so attorney's fees are traditionally distinct from taxed costs, and the distinction rests on substantial and clear differences.

(1) Attorney's fees compensate for substantial professional services; costs, for the much less substantial, purely routine mechanical tasks in the prosecu-

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[4] In *Pioneer*, however, the provision obligating the mortgagor to pay an attorney's fee was judicially enforceable only because a State statute validated such agreements as contracts of indemnity. Prior to the enactment of the State statute, the State treated such agreements as unenforceable penalty provisions. See *Hollaway* v. *Pocahontas Federal Savings & Loan Ass'n*, 230 Ark. 310, 312, 323 S.W. 2d 204, 206.

tion of a lawsuit, such as filing pleadings and printing the record.[5]

(2) Attorney's fees are usually not taxed against the losing party in the suit; costs are.

(3) Attorney's fees are generally the most substantial element of the expenses of litigation; not so costs, which represent a much smaller, and usually nominal,[6] amount. For this reason alone, the government has little incentive in the usual case to challenge their priority.

(4) The routine expenses reflected in taxed costs are necessary incidents to foreclosure, and hence benefit all lienholders; but as this Court noted in *Pioneer* (p. 92, n. 13), "[t]he attorney's services * * * were rendered for the benefit of the mortgagee to protect his interest in the property, and the United States, holding an adverse interest, received no such benefit from them that its interest is to be charged therefor."

(5) The government has not challenged the priority of taxed costs in mortgage foreclosure proceedings. Their priority was conceded in *Pioneer* itself. This Court implicitly accepted the distinction between

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[5] The New Jersey statute that includes in general costs an allowance of $50 for drawing pleadings in a mortgage foreclosure case is not inconsistent. This "very old provision * * * was enacted at a time when there was little or no service of notices by mail, and contemplated the drawing of them in manuscript, copying them by hand, and the actual service of them on the respondents personally." *Steelman* v. *Moore Bros. Glass Co.*, 93 N.J. Eq. 533, 536.

[6] Here, the attorney's fee was more than twice the other taxed costs, and the disproportion would probably have been much greater had a larger mortgage been involved.

taxed costs and attorney's fees in holding the latter, but not the former, subordinate to the federal tax lien.

In view of the settled and substantial differences between taxed costs and attorney's fees,[7] it is plain that here, as in *Buffalo Savings*, the State statute has made a classification that is purely artificial and formal in assimilating attorney's fees to traditional taxed costs. If State classification of attorney's fees as part of the taxable costs of the foreclosure proceeding is accepted as determining the priority of such fees over the federal tax lien, the way to erosion of the *Pioneer* holding will be wide open.

3. Not only did the court below, in our view, misapply the basic rationale of *Pioneer* and ignore the teaching of *Buffalo Savings*, but its decision has wide practical implications. Quite apart from the danger that other States may seek to emulate New Jersey and pass similar statutes to the one in suit here, the laws of a number of States besides New Jersey already authorize the payment to the mortgagee of an attorney's fee out of the proceeds of the foreclosure sale.[8] Moreover, in view of the suggestion of the

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[7] The New Jersey Supreme Court itself has recognized, in other contexts, that attorney's fees, "although if allowable are included in the taxed costs, are an entirely different matter." *United States Pipe* v. *United Steelworkers*, 37 N.J. 343, 356.

[8] Cal. Code Civ. Proc. § 730; 2 Colo. Rev. Stat. (1963) § 13-16-6; Conn. Gen. Stat. Ann. § 49-7; 5 Del. Code Ann., Tit. 10, § 3912; 19 Fla. Stat. Ann. § 687.06; 44 Iowa Code Ann. § 625.22; New York Civ. Prac. Law and Rules §§ 8302-8303; 46 Okla. Stat. Ann. § 56; 4 Vt. Stat. Ann. § 4527; Rev. Code of Wash. Ann. § 4:84:020.

court below (Appendix, pp. 14-15, *infra*) that the result accomplished directly by the New Jersey statute here could be accomplished indirectly simply by increasing the amount of general costs taxable in a mortgage foreclosure proceeding, there is a clear need for this Court to define the line between attorney's fees that are subordinate to federal tax liens and traditional taxed costs.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD M. ROBERTS,
Acting Assistant Attorney General.

JOSEPH KOVNER,
GEORGE F. LYNCH,
Attorneys.

OCTOBER 1965.

APPENDIX

SUPREME COURT OF NEW JERSEY

No. A-47, September Term, 1964

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a corporation of the State of New York, PLAINTIFF-APPELLANT

vs.

ALBERT BAGIN (a/k/a Alben Bagin), et al., DEFENDANTS-RESPONDENTS

Argued December 15, 1964. Decided

Mr. Frank W. Hoak argued the cause for the plaintiff-appellant (*Mr. Donald B. Jones*, attorney).

Mr. Edward J. Turnbach, Assistant United States Attorney, argued the cause for the defendant-respondent United States of America (*Mr. David M. Satz, Jr.*, United States Attorney, attorney; *Mr. Martin G. Holleran*, Assistant United States Attorney, on the brief).

PER CURIAM:

The plaintiff, The Equitable Life Assurance Society of the United States, held a $30,000 first mortgage and an accompanying bond which were executed, on December 19, 1960, by the defendants Albert Bagin and Erika Bagin, his wife. Upon default, the plaintiff filed a foreclosure complaint setting forth the execution of the bond and mortgage, the execution by the Bagins of a second mortgage dated December 19, 1960 and held by William Hawkey, and the filing by

the United States, on March 21, 1962, of notice of a $7,748.91 federal lien for withholding taxes. See 26 *U.S.C.A.* §§ 6321-6323. The defendant Hawkey filed an answer joining in the plaintiff's demand for judgment and demanding that the amount due on his mortgage be fixed and that the lands be sold to satisfy that amount as well as the amount due to the plaintiff. The defendant United States filed an answer in which it requested that its encumbrance be reported on.

On motion, the Chancery Division determined that the plaintiff was entitled to the sum of $30,052.14 plus interest, and also to taxed costs which amounted to $630.30, inclusive of the fee of $425.52 provided for in *R.R.* 4:55-7(c); the sum due the defendant Hawkey was determined to be $5,104 plus interest, and taxed costs which amounted to $25. The United States expressly conceded the priority of the mortgages including principal, interest and taxed costs, exclusive, however, of the $425.52 item. With respect to that item it contended that the plaintiff was not entitled to priority under the principles expressed by the Supreme Court in *United States* v. *Pioneer American Ins. Co.*, 374 *U.S.* 84, 10 *L.Ed.2d* 770 (1963) and *United States* v. *Buffalo Savings Bank*, 371 *U.S.* 228, 9 *L.Ed.2d* 283 (1963). The Chancery Division agreed with its contention, and entered an order of priority of payment of liens which deferred the $425.52 item until after payment of both mortgages and the lien of the United States. Without awaiting the sale of the property, the plaintiff appealed to the Appellate Division and before argument there we certified.

After hearing oral argument we directed that the sale of the property be proceeded with. This has been done and the net sum (after payment of the fees and commissions due to the sheriff and clerk) now in hand

for distribution is $39,193.31. The plaintiff contends that its priority includes the $425.52 item and that consequently the order of distribution should be as follows:

to the first mortgagee, $30,052.14 plus interest of $2,-830.58 plus taxed costs of $630.30—total $33,513.02; to the second mortgagee, $5,104 plus interest of $485.12 plus taxed costs of $25—total $5,614.12; to the United States the balance of $66.17. On the other hand, the United States contends that the first mortgagee's priority as against it does not include the $425.52 item and that distribution should be made by providing "for a priority adjustment fund consisting of the principal and interest, plus costs, of the two prior mortgages to be distri ted in accordance with state law, but the surplus, if any, representing the Taxpayer's interest in the property at the time the federal tax lien arose, should be applied to the federal tax lien in full." Under this approach the fund would consist of $33,087.50 for the first mortgagee, $5,614.12 for the second mortgagee, and a surplus of $491.69 for the United States, with the State remaining at liberty, however, to decide under its own laws that the $425.52 be paid to the plaintiff by reducing the second mortgagee's judgment in that amount.

Taxed costs are traditional and incidental allowances which are of some help in defraying portions of the heavy expenses of litigation incurred by the prevailing parties. They are of long usage and are generally provided for by statutes and court rules. In the federal courts they include (28 *U.S.C.A.* § 1920) such items as fees of the clerk, marshal, court reporter and witnesses, printing costs, and "attorney's and proctor's docket fees." This last item is specifically governed by 28 *U.S.C.A.* § 1923 and, while the amounts listed there are meager, they occasionally add

up to more significant sums. See, *e.g.*, *Missouri* v. *Illinois*, 202 *U.S.* 598, 50 *L.Ed.* 1160 (1906) where the taxed costs included $720 for "solicitors' fees, *viz*, $20 for attendance at final hearing and $2.50 for each deposition taken and admitted in evidence." Under various federal statutory provisions further allowances for attorneys' fees may be made and included in the taxed costs. See *Peck, Taxation of Costs in United States District Courts*, 42 *Neb.L.Rev.* 788, 799 (1963); 6 *Moore's, Federal Practice par.* 54.71 (2*d ed.* 1953).

In the state courts, taxed costs are generally dealt with in similar fashion. See 20 *Am.Jur.2d, Costs*, § 5 *et seq.* (1965); 4 *Utah L.Rev.* 501 (1955); 5 *N.H. Bar J.* 114 (1963); 42 *Mich. State Bar J.* 12 (Nov. 1963). In our own State there are governing statutes and court rules (*N.J.S.A.* 22A:2-1 *et seq.*; *R.R.* 4:55-6) some of which deal specifically with mortgage foreclosure proceedings. See *U.S. Pipe, etc.* v. *United Steelworkers of America*, 37 *N.J.* 343, 355 (1962). Thus *N.J.S.A.* 22-A:2-10 provides for allowance in the taxed costs of $50 for the attorney's "drawing of papers" in foreclosure actions, *R.R.* 4:55-9 provides that in such actions legal fees and charges incurred in procuring title searches may be included in the taxed costs, and *R.R.* 4:55-7(c) provides that in such actions, allowance for legal services in the taxed costs shall be calculated at 3% on the first $5,000 adjudged to be due the plaintiff, 1½% on the excess over $5,000 and up to $10,000, and 1% on the excess over $10,000. While this is designed towards further defrayal of some of the plaintiff's actual foreclosure costs, it is still not aimed at full compensation for the legal expenses incurred by the plaintiff; the percentages are fixed at low levels (2A *Waltzinger, New Jersey Practice* 28 (1954)), are not related to the actual extent

of the legal services performed by the plaintiff's attorney, and are thus applicable even where the foreclosure is contested or complex. While *R.R.* 4:55-7 (c) is part of our current court rules, its counterparts may be found in early statutes and rules of the former Court of Chancery. See *L.* 1902, *c.* 158, § 91; *Kocher's, Chancery Practice* 74 (1913). The allowance under the rules in the taxed costs is, of course, part and parcel of the plaintiff's judgment in foreclosure. See *R.R.* 4:55-8.

When Congress directed that the government's lien under section 6321 "shall not be valid as against any mortgagee" it did not specifically spell out the elements of the mortgagee's claim entitled to priority. See 26 *U.S.C.A.* § 6323. But it seems entirely clear that at least principal, interest and costs were within the congressional contemplation. That much is not disputed by the government which set forth in its brief that here "the first and second mortgages were recorded before the federal tax lien was recorded and hence the principal and interest, plus costs of these mortgages are superior to the federal tax lien." And in a report submitted to this Court by the government following the sale of the foreclosed property it set forth the first mortgagee's priority as including principal, interest and taxed costs amounting to $204.78. This latter sum consisted of filing fees, sheriff's fees and mileage, and $50 under *N.J.S.A.* 22A:2-10 for drawing pleadings plus $100.78 search fees under *R.R.* 4:55-9. While the government excluded the sum of $425.52 due the first mortgagee under *R.R.* 4:55-7 (c), we fail to find any sensible basis for differentiating that item from the other items acknowledged by the government. Thus the $50 item represents services by the plaintiff's attorney as might the $100.78 item. Without impairing their true character as tra-

ditional and incidental costs, the state could readily and conveniently have provided for larger sums, by statutory or rule provision allowing individual amounts for each of the pleadings filed or each of the steps taken. In their aggregate these could well have exceeded those provided by the modest percentages fixed in *R.R.* 4:55-7(c) and, for present purposes, it would appear wholly immaterial which of these courses the State has chosen in dealing with its allowance of taxed costs.

The government continues its reliance on *Buffalo Savings*, *supra*, and *Pioneer*, *supra*, but these cases involved different situations. In *Buffalo Savings* the mortgage was executed in 1946, the government's lien was filed in 1953, and thereafter in 1957 and 1958 local liens for unpaid real estate taxes attached to the property. On foreclosure, the trial court directed that the local real estate taxes be paid as part of the expenses of sale prior to the satisfaction of the government's lien. This was reversed by the Supreme Court in a *per curiam* which pointed out that "the state may not avoid the priority rules of the federal tax lien by the formalistic device of characterizing subsequently accruing liens as expenses of sale." 374 *U.S.* at 229, 9 *L.Ed.2d* at 284. Here we are not dealing with any formalistic device or any circumvention of federal priority but with a traditional and incidental allowance by way of taxed costs for services which were truly part of the plaintiff's actual legal costs and expenses in foreclosing its mortgage. Indeed it may be assumed that its actual foreclosure expenses here exceeded its taxed costs. Its efforts in pursuing the foreclosure through sale have benefited not only the mortgagees but the government as well. In a fair sense, it has produced a fund from which the government will receive a return without any ex-

penditure on its own part. It would therefore appear that not only are the significant legal considerations unfavorable to the government's position here but so also are the equitable ones. See *Washington Const. Co.* v. *United States of America*, 75 *N.J. Super.* 536 (*Ch.Div.* 1962); *Smith* v. *Smith*, 78 *N.J. Super.* 28 (*Ch.Div.* 1963); *but cf. United States* v. *Pioneer American Ins. Co., supra*, 374 *U.S.* at 92, 10 *L.Ed.* 2*d* at 777 n.13; *Camptown Savings & Loan Assn.* v. *United States, etc.*, 85 *N.J. Super.* 18, 20 (*App.Div.* 1964).

In *Pioneer* the holder of a note and mortgage instituted foreclosure proceedings in a state court. The note was in the face amount of $20,000 and contained a provision that in the event of court proceedings the mortgagor would pay "a reasonable attorney's fee." The foreclosure decree fixed the attorney's fee at $1250 and "after satisfaction of court and foreclosure sale costs" the mortgagee was accorded first priority for principal, interest and the attorney's fee. The Supreme Court, in holding that the federal tax lien under section 6321 was entitled to priority over the attorney's fee, found the latter to be inchoate rather than choate. See *Kennedy, The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 *Yale L.J.* 905, 911 (1954); *Note, Federal Priorities & Tax Liens*, 63 *Colum.L.Rev.* 1259, 1264 (1963). Among other matters, it pointed to the fact that the mortgagee was obligated to pay a "reasonable" fee, that this related "to the service to be performed by the attorney," and that it could not be "finally fixed in amount" until the date of the decree. 374 *U.S.* at 87, 90-91, 10 *L.Ed.2d* at 773-774, 776.

Pioneer did not deal with any item of taxed costs allowed by statute or court rule but with a contractual agreement for the payment of a fee. *Cf. Bergen*

Builders, Inc. v. *Horizon Developers, Inc.* 44 *N.J.* 435 (1965). That contractual agreement provided, not for a fixed percentage as in *Security Mortg. Co.* v. *Powers*, 278 *U.S.* 149, 73 *L.Ed.* 236 (1928) (and as in our *R.R.* 4:55-7(c)), but for a reasonable fee which could not be ascertained until all of the legal work had been done and the final decree was about to be entered. While *Security Mortgage* dealt with a bankruptcy proceeding, it is to be noted that there Justice Brandeis remarked that "the lien was not inchoate" but "had already become perfect when the principal note and the loan deed serving it were given." 278 *U.S.* at 156, 73 *L.Ed.* at 241. See *United States* v. *Seaboard Citizens Nat. Bank*, 206 *F.2d* 62 (*4th Cir.* 1953).

The contours of the Supreme Court's doctrine of choateness remain to be fixed and undoubtedly further pronouncements by that Court will be handed down. See *United States* v. *Vermont*, 377 *U.S.* 351, 12 *L.Ed.2d* 370 (1964); *Kennedy, From Spokane County to Vermont: The Campaign of the Federal Government Against the Inchoate Lien*, 50 *Iowa L. Rev.* 724 (1965); *compare Streeter* v. *Overfelt*, 202 *F.Supp.* 143, 146 (*D. Mont.* 1962), *with First National Bank of Lewistown* v. *Tilzey*, 238 *F.Supp.* 750 (*D. Mont.* 1965). Nothing thus far, including *Pioneer* which contains no discussion whatever on the subject of taxed costs, persuades us that the traditional and incidental allowances in foreclosure proceedings under *R.R.* 4:55-7(c) are not lawfully and justly entitled to the same priority as that afforded to the mortgage principal and interest.

Reversed and remanded for distribution in conformity with the views expressed in this *per curiam*.

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 4566

Civil Action
On Appeal

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, PLAINTIFF-APPELLANT

vs.

ALBERT BAGIN, ET AL., DEFENDANTS-RESPONDENTS

Mandate on Reversal

This cause having been duly argued before this Court by Mr. Frank W. Hoak, counsel for the appellant and Mr. Edward J. Turnbach, counsel for the respondent, and the Court having considered the same.

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Chancery Division is in all things reversed, set aside and for nothing holden, with costs;

.....

and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record and proceedings be remitted to the said Superior Court, Chancery Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the 6th day of July, 1965.

/s/ John H. Gildea
Clerk
Clerk of the Supreme Court

A TRUE COPY

/s/ John H. Gildea
Clerk

FILED
JULY 6, 1965
John H. Gildea
clerk

SUPREME COURT OF NEW JERSEY

No. N-36 September Term 1965

EQUITABLE LIFE ASSURANCE SOCIETY,
PLAINTIFF-APPELLANT

vs.

ALBERT BAGIN, DEPENDANT-RESPONDENT

Motion for stay of mandate.

This matter having been duly considered by the Court, it is ORDERED that the mandate of this court issue with instructions that distribution be withheld of the sum of $491.69 and that distribution be permitted of the conceded priority adjustment fund.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton this twenty-first day of September 1965.

/s/ John H. Gildea
Clerk

A TRUE COPY

/s/ John H. Gildea
Clerk

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